IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 1458 OF 1999

IN

ARBITRATION PETITION NO. 145 OF 1999

AND

APPEAL NO.1457 OF 1999

IN

ARBITRATION PETITION NO. 146 OF 1999

The Municipal Corporation of
Greater Mumbai. ... Appellants
(org. Petitioners)

Versus

M/s. Pre-Stress Products (I) Ltd.
& Anr. ... Respondents

Mr. R.D.Dhanuka with Mr. K.N.Gaikwad, Advocates for the Appellants.

Mr. S.J.Kamdar, Advocate i/b. M.Jariwala & Associates for Respondents.

CORAM: D.K.DESHMUKH &
J.H.BHATIA,JJ.

DATE: 28th September,2007.

P.C.

1. It is common ground that the facts and law involved in these Appeals are identical and, therefore, both these Appeals can be conveniently disposed of by a common order.

2. Sometime in the year 1981, the appellant-corporation invited tenders for execution of civil work for construction of Effluent Pumping Station at Versova referred to as "Contract No. 4/A" and also at Malad which is referred to as "Contract No.5/A. The work was allotted to the respondents. Both the said works were duly executed. In respect of both the said works, disputes and differences arose in respect of several items mentioned in the final bill. The final bill was prepared by the appellant-Corporation on 5.4.1990. The contractor signed the same under protest on 14.8.1990 and after complying with the requirements of notice under clause 96 of the General Conditions of Contract, the disputes were referred to the Arbitration of Mr.Justice D.M.Rege (Retd.) who made two awards both dated 20.11.1995, one in respect of Contract No.4/A and the other in respect of Contract No.5/A. Thereafter,

the contractor by letter dated 8.5.1997 raised the demand for escalation amount with interest in relation to both the contracts alleging that the appellant-Corporation has now adjudicated and legally authenticated quantities of work done which were in dispute and, therefore, corresponding escalation of work done was required to be paid as per the contract. The demand was rejected by the Corporation. Thereafter the arbitration clause was invoked by the contractor and Mr.Justice Suresh (Retd.) came to be appointed as the arbitrator. The learned arbitrator passed the impugned award and has awarded escalated cost to the contractor with interest at the rate of 16% per annum.

3. The principal ground on which the claim for escalation was opposed was that the cause of action for making a claim for escalation accrued to the contractor when the cause of action accrued to him for claiming payment for the work done under the contract which claim was actually made before the arbitrator and award has also been made in relation thereto. As the claim for escalation was not raised in the first reference, the claim is barred by principles of constructive res judicata incorporated in Order II Rule 2 of the Code of Civil Procedure. The learned arbitrator rejected this challenge and made the award in favour of the contractor. An objection was filed to the award before

this Court. The objection was mainly the same which was raised before the learned arbitrator. The learned Single Judge, by the orders impugned in the Appeals, has rejected the objections raised by the Corporation to the award. The learned Single Judge has held that the cause of action for making a claim for escalation accrued to the contractor when the award was made in the first reference by the arbitrator. It is, therefore, the awards made by the learned arbitrator as also the order passed by the learned Single Judge which are challenged in the present Appeals.

4. The learned Counsel appearing for the appellants relies on a Judgment of the Supreme Court in the case of **K.V.George vs. The Secretary to Govt, Water and Power Dept.Trivandrum and another**, **reported in AIR 1990 SC 53** to contend that the principles of constructive res judicata incorporated in the Order II Rule 2 of the C.P.C. are applicable to arbitration proceedings. He submits that in order to find out as to when the cause of action for making claim for reimbursement of the escalated costs accrues to the contractor, one has to refer to the provisions of the contract between the parties. He submits that according to clause 74 of the contract, a contractor becomes entitled to claim reimbursement on carrying out of the work. He submits that clauses 74(a) and 74(b) contain the formula for

computation of the escalation. According to him, clause 74(b) requires escalation to be computed on the basis of the formula and to be included in each bill. He further submits that according to clause 83, interim bill is required to be submitted by the contractor at the interval of not less than one month for the work executed. He further submits that final bill, according to clause 88 is to be submitted on completion of the entire work. He submits that therefore the cause of action to claim escalation accrues when the work is completed the escalated costs are to be computed according to the formula given in clause 74 and claim is to be made in each interim bill to be submitted. If any amount in the interim bill remains unpaid, the amount can be included in the final bill and if the Corporation declines to make payment, a dispute can be raised and referred to arbitrator. According to the learned Counsel, this is the scheme of the contract and, therefore, the cause of action to claim escalation arises not later than the date on which the work is completed and the contractor realises that he has become entitled to claim escalation in terms of the contract. The learned Counsel submits that as the cause of action accrued on the date of completion of the work, when the dispute about non-payment of the price of the work which was carried out excluding the escalated cost was made claim for escalated cost has also to be made or leave

has to be sought of the arbitrator to make that claim subsequently. He submits that the finding recorded by the arbitrator and the learned Single Judge that the cause of action will accrue only after the award is made by the arbitrator in the first Reference made to him is contrary to the terms of the contract.

5. The learned Counsel appearing for the contractor does not dispute that cause of action for a civil suit and cause of action for making a claim to arbitration will accrue on the same day. In other words, cause of action for making a claim for arbitration does not accrue on the same date, when the cause of action for filing a civil suit accrues. He also doe not dispute that the principle incorporated in the provisions of Order II Rule 2 of the C.P.C. is applicable to arbitration, but the learned Counsel submits that in this case, there was dispute between the parties whether the work for which claim was made in the earlier arbitration was actually done or not. According to him, therefore, right to claim escalated cost in relation to that work will accrue only after the arbitrator holds that the work was actually done by the contractor under the contract and he has become entitled to claim payment for the same. He further submits that though the terms of the contract require interim bill and final bill to be submitted by the contractor, in the present case,

interim bill and final bill were prepared by the Corporation and therefore to that extent there was variation in the terms of the contract.

6. Now, from material on record and the submissions made by the learned Counsels, it is clear that the first question that will have to be enquired into and answered is as to when does cause of action for claiming escalated costs accrues to a contractor? There is no dispute that for the purpose of deciding this question, it is only the provisions of the contract between the parties which will have to be looked into. Therefore, the first reference has to be made to clause 74. Clause 74 reads as under :-

"74. Reimbursement/ refund on variation of labour and materials	The contractor shall be reimbursed or shall refund to the Corporation as the case may be the variation in the value of the work carried out from time to time, depending on whether the prices of material and Labour as a whole rise or fall, and the method adopted for such computations shall be as given below, it being clearly understood that the contractor shall have no claim for being reimbursed on the ground that the price of a particular material or group of materials have risen beyond the limits of the presumptions made in the following paras, nor shall the Corporation have any right to claim refund on the same grounds not will any variation be allowed on the grounds of rise in Sales tax, octroi or any other Govt. duties."

Perusal of the above clause 74 shows that a contractor becomes entitled to claim reimbursement from the Corporation of the variation in the value of the work carried out by him from time to time. It is thus clear that the right accrues to a contractor for claiming reimbursement of the extra expenditure incurred by him on completion of the work for which extra expenditure in relation to material and labour was incurred by him. Then comes Clause 74(b). Clause 74(b) recites thus :-

> "74(b) Labour and other materials -
>
> For the purpose of this contract and for allowing reimbursement or refund on account of variation of prices of labour and material, computation will be based on the formula enunciated below which is based on the presumptions that;
>
> i) The general price level of labour and material as a whole rises or falls in proportion to the rise or fall of consumer price index number 9 (General) for working class in Bombay.
>
> ii) and that the component of labour, material etc. is to the extent or 88 per cent of the

value of the work carried out.

V - (0.88R - C) $\frac{I - 10}{IO}$ LM

Where V -

LM - the variation to be reimbursed or claimed as refund on account of general rise or fall of index referred above.

T- Total value of the work done during the period under reference as recorded in the measurement book excluding water charges and sewerage charges but including cost of excesses in respect of item upto 25 per cent as stated in condition No. 73(a) and cost of extra items and provisional items of work where the rate is based on conditions nos. 73(b)(i) & (ii).

C - Total value of controlled materials used for the works as recorded in measurement book and paid for at original basic rate plus the value of materials used and paid for the works from the supplies made from the Municipal stores in accordance with the contract conditions during the period under reference.

(i) The rate at which the value of ‘C’ is worked

out shall be basic rate plus supervision charges in case of materials supplied by the Corporation.

(ii) The quantity of the controlled material adopted in working out the value of ‘C’ shall be inclusive of permitted wastages as/if mentioned in specifications.

(iii) The basic rate for the supply of controlled material shall be inclusive of all the components of cost of material excluding transport charges incurred for bringing the material from place of delivery to the site.

I - Consumer price Index number for working class for Bombay (Declared by the Commissioner of Labour and director of Employment, Bombay) applicable to the period under reference (base year ending 1960 as 100).

IO - Consumer Price Index number for working class for Bombay (Declared by the Commissioner of Labour and director of Employment, Bombay) applicable to the last date of submission of the tender.

Computations based on the above formula will be made for the period of each bill separately and reimbursement will be made to (When the result is plus) and refund will be claimed from (when the result is minus) the Contractor's next bill. (emphasis supplied).

This condition shall not be applicable to that portion of work which is carried out after the contract period or its authorised extension without penalties is over.

A similar price variation will be calculated separately for extras and/or excesses and provisional sum calculated under condition Nos. 73(a) (i) (ii) and 73(b) (iii) based on the above formulas. IO being the consumer price index applicable to the date on which the rates under conditions Nos. 73(a)(i) and (ii) and 73(b) (iii) will be fixed.

It is, thus, clear that computation for claiming escalation on the basis of the formula incorporated in Clause 74(b) has to be made for the period of each bill. Then comes clause 83. Clause 83 reads as under :-

"83. Interim payment -

> Interim bills shall be submitted by the contractor from time to time (but at an interval of not less than one month) for the works executed. The Engineer shall then arrange to have he bill verified by taking or causing to be taken, where necessary, the requisite measurement of work.
>
> Payment on account for amount admissible shall be made on the Engineer certifying the sum to which the contractor is considered entitled by way of interim payment for all the work executed, after deducting therefrom the amount already paid, the security deposit/retention money and such other amounts as may be deductable or recoverable in terms of the contract."

It is clear that interim bill is to be submitted by the contractor at an interval of not less than one month from the execution of the work. Reading of clause 74 with clause 83, quoted above, makes it clear that before submission of interim bill the contractor has to assess whether in terms of the contract he is entitled to claim escalation in relation to the work completed by him upto that point of time and then the amount of escalation has

to be worked out on the basis of the formula given in clause 74 and he has to submit interim bill according to his own calculation. Therefore, it is clear that entitlement to claim escalation arises on carrying out the work and claim for escalation has to be made in the interim bill submitted. Then comes clause 88. It reads as under :-

> "88. Payment of Final Bill -
>
> The final bill shall be submitted by the contractor within three months of physical completion of the works. No further claims shall be made by the contractor after submission of the final bill and these shall be deemed to have been waived and extinguished. Payment of those items of the bills in respect of which there is no dispute and of items in dispute, for quantities and rates as approved by the Commissioner shall be made within a reasonable period as may be necessary for the purpose of verification etc.
>
> After payment of the final bill as aforesaid has been made, the contractor may, if he so desires, reconsider his position in respect of a disputed portion of the final bill and if he fails to do

> so within 90 days, his disputed claim shall be dealt with as provided in the contract."

Perusal of the above clause shows that the final bill is also to be submitted by the contractor within three months of physical completion of the work. It is obvious that when the contractor has completed the entire work, he would know whether, in terms of the contract he is entitled to claim escalated costs in relation either the whole work or part of the work, and therefore if the contractor thinks that he is entitled to claim escalated costs, he has to include that claim in the final bill. Clause 88 makes it clear beyond doubt that all claims that the contractor may have against the Corporation arising from the contract have to be included in the final bill. If the contractor has made some claims in the interim bill and those claims have not been paid by the Corporation even those claims can be included by the contractor in the final bill and if any amount remains unpaid, including amount of escalation, the contractor is entitled to claim reference of the dispute to arbitration. The submission of the learned Counsel that because there was dispute between the parties in relation to the main work in respect of which escalation was claimed, the cause of action will accrue only after the arbitrator holds that the contractor is entitled to be paid for that work, in

our opinion, has no substance because the right of the contractor to claim escalation does not depend on whether his claim is accepted by the Corporation or not. The cause of action accrues to the contractor when, according to him, for completing the work he was required to spend more and, therefore, has become entitled to claim escalation in terms of the contract. In our opinion, therefore, the learned Single Judge was not justified in saying that the cause of action will get postponed till the first claim is decided. In our opinion, even assuming that though the cause of action accrued to the contractor, the contractor was not in a position to calculate the amount to which he is entitled because dispute regarding the main work was pending. It was open to the contractor to seek leave of the arbitrator to make that claim subsequently. But without seeking leave, the contractor could not have omitted to refer the claim regarding escalated costs to the arbitrator. In our opinion, the claim for the escalated costs made by the contractor was clearly barred by the principles contained in Order II Rule 2 of the C.P.C. So for applicability of the principles contained in Order II Rule 2 of the C.P.C. to arbitration there was no dispute before us in view of the judgment of the Supreme Court in the case of K.V.George referred to above specially the following observations in paragraphs 16 to 19 :-

"16. In the instant case, the contract was terminated by the respondents on April 26, 1980 and as such all the issues arose out of the termination of the contract and they could have been raised in the first claim petition filed before the Arbitrator by the appellant. This having not been done the second claim petition before the arbitrator raising the remaining disputes is clearly barred.

17. With regard to the submission as to the applicability of the principles of res judicata as provided in Section 11 of the Code of Civil Procedure to arbitration case, it is to be noted that Section 41 of the Arbitration case provides that the provisions of the Code of Civil Procedure will apply to the Arbitration proceedings. The provisions of res judicata are based on the principles that there shall be no multiplicity of proceedings and there shall be finality of proceedings. This is applicable to the arbitration proceedings as well. It is convenient to refer to the decision in Daryao v. State of U.P. (1962) 1 SCR 574 at pp. 582, 83: (AIR 1961 SC 1457 at p. 1462), wherein it has been held that the principles of res judicata

will apply even to proceedings under Articles 32 and 226 of the Constitution of India. It has been observed that :-

"Now, the rule of res judicata as indicated in S.11 of the Code of Civil Procedure has no doubt some technical aspects, for instance the rule of constructive res judicata may be said to be technical, but the basis on which the said rule rests is founded on considerations of public policy. It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by Courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of res judicata they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under Art.32"

18. In Satish Kumar v. Surinder Kumar, AIR 1970 SC 833, it has been observed that (at p.838) :-

"The true legal position in regard to the effect

of an award is not in dispute. It well settled that as a general rule, all claims which are the subject-matter of a reference to arbitration merge in the award which is pronounced in the proceedings before the arbitrator and that after an award has been pronounced, the rights and liabilities of the parties in respect of the said claims can be determined only on the basis of the said award. After an award is pronounced, no action can bed started on the original claim which had been the subject-matter of the reference.... This conclusion, according to the learned Judge, is based upon the elementary principle that, as between the parties and their privies, an award is entitled to that respect which is due to judgment of a court of last resort. Therefore, if the award which has been pronounced between the parties has in fact, or can in law, be deemed to have dealt with the present dispute, the second reference would be incompetent. This position also has not been and cannot be serious disputed."

19. Considering the above observations of this Court in the aforesaid cases we hold that the principle of res judicata or for that matter the

> principles of constructive res judicata apply to arbitration proceedings and as such the award made in the second arbitration proceeding being Arbitration Case No.276 of 1980 cannot be sustained and is therefore, set aside. The High Court has rightly allowed the F.M.A. No.304 of 1982 holding that the appellant-contractor was precluded from seeking the second reference. No other points have been raised before us by the appellant."

7. In the result, the Appeals succeed and are allowed. The orders passed by the learned Single Judge are set aside.

8. Arbitration Petition Nos.145 of 1999 and 146 of 1999 are granted in terms of prayer clause (a) of those Petitions.

9. It is common ground that the award amount has been deposited by the Corporation in this Court and it is lying in this Court invested. In view of the order that we have made, the appellants are permitted to withdraw the amount with accruals.

Both the Appeals are disposed of.

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(D.K. DESHMUKH,J.)

(J.H.BHATIA,J.)